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Supreme Court, U.S.
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IN THE
Supreme Court of the United States

NATHAN A. CHAPMAN, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether criminal defense counsel provides the "Assistance" guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a trial over the defendant's objection.

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INTRODUCTION

This case turns on the simple and fundamental point that a criminal trial is all about the *defendant*'s, not his *counsel*'s, right to life, liberty, or property. Thus, while the Sixth Amendment guarantees the "Assistance" of counsel, the defendant ultimately remains the master of his own defense. Counsel serves as the defendant's agent, but the defendant is always free to revoke or limit that agency. It follows that, where the defendant and counsel disagree, a court must heed the defendant's, not his counsel's, wishes.

In this case, the Fourth Circuit departed from these bedrock principles. The court acknowledged that some decisions in the criminal process—whether the defendant should plead guilty, waive a jury, testify on his own behalf, or take an appeal—are so fundamental that they require consultation with, and consent from, the defendant. But apart from these specific decisions, the Fourth Circuit broadly held, defense counsel alone has the "right" to make all other decisions regarding the conduct of a criminal trial, *even over the defendant's express objections*. According to the Fourth Circuit, "if consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client." App. 8a.

That is a *non sequitur* of truly epic proportions that turns our representational system of justice on its head. It is one thing to recognize that counsel serves as the defendant's agent in the context of criminal proceedings and is generally free to make

decisions on the defendant's behalf without consulting with, or securing consent from, the defendant. But it is another thing altogether to assert that counsel is thereby free to override express instructions and bind the defendant over his objections. Just because counsel is not required to secure the defendant's consent for a particular decision, in other words, does not mean that counsel has a "right" to ignore his client's instructions. As Justice Scalia has put it, "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez v. United States*, 553 U.S. 242, 254 (2008) (opinion concurring in the judgment). Under no circumstances does counsel provide the "Assistance" guaranteed by the Sixth Amendment by making a tactical decision regarding the conduct of a criminal trial over the defendant's objection.

The Fourth Circuit decision below (like the Eleventh Circuit decision on which it relies, *United States v. Burke*, 257 F.3d 1321, 1323-24 (11th Cir. 2001)) squarely conflicts not only with this Court's landmark decision holding that the right to defend is personal to the defendant, *see Faretta v. California*, 422 U.S. 806, 818-36 (1975), but also with decisions by the North Carolina and Tennessee Supreme Courts holding as a matter of federal constitutional law that in the event of a disagreement between counsel and defendant over a tactical decision regarding the conduct of a criminal trial, the defendant's wishes must control, *see, e.g.*, *State v. Brown*, 451 S.E.2d 181, 186-87 (N.C. 1994); *State v. Ali*, 407 S.E.2d 183, 188-90 (N.C. 1991); *Zagorski v. State*, 983 S.W.2d 654, 657-59 (Tenn. 1999). The decision below thus leads to the anomaly that a

defendant in *federal* court in North Carolina has diminished federal constitutional rights as compared to a defendant in *state* court in North Carolina. Because the decision below not only conflicts with this Court's precedents but also exacerbates a conflict among federal appellate courts and state supreme courts on a matter of federal constitutional law, *see* S. Ct. R. 10(a), this Court should grant review.

OPINIONS BELOW

The Fourth Circuit's opinion is reported at 593 F.3d 365 and reprinted in the Appendix ("App.") at 1-15a. The Fourth Circuit's unreported order denying rehearing and rehearing en banc is reprinted at App. 16a. The district court's opinion is reported at 2008 WL 3896116, and reprinted at App. 18-23a.

JURISDICTION

The Fourth Circuit issued its decision on January 29, 2010, and denied a timely rehearing petition on March 30, 2010. App. 1a, 16a. On June 21, 2010, the Chief Justice extended the time within which to file this petition until August 27, 2010. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

PERTINENT CONSTITUTIONAL PROVISION

The Sixth Amendment provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence.

U.S. Const. amend. VI.

STATEMENT OF THE CASE

A. Background

In 2003, petitioner Nathan A. Chapman Jr. was indicted in the U.S. District Court for the District of Maryland on various charges of fraud and false statements stemming from complex securities transactions. The trial took place in the summer of 2004.

After closing arguments, Chapman's defense counsel brought to the district court's attention that, in rebuttal arguments, the Government had made comments pertaining to a subject that the court had previously ruled inadmissible. App. 31a. The court (Quarles, J.) told counsel to draft a curative instruction. *Id.* Counsel then stated that the defense would be moving for a mistrial. *Id.* The following colloquy thereupon ensued:

> THE COURT: You want one [a mistrial]?
>
> [CHAPMAN'S COUNSEL]: With prejudice.
>
> THE COURT: Nope. I'll give you a mistrial without [prejudice] if you want one. I give mistrials regularly. If you want a mistrial, you'll get one.
>
> [CHAPMAN'S COUNSEL]: We're just preserving the record, and wanting one with prejudice, Your Honor.
>
> THE COURT: No. If you want a mistrial, don't play with me on that, because I'll give you a mistrial. I have nothing to do but be here again. If you want to try this at your client's expense again—do you want a mistrial?

> [CHAPMAN'S COUNSEL]: No, Your Honor.
>
> THE COURT: I'm sorry. You want a mistrial?
>
> [CHAPMAN'S COUNSEL]: Only with prejudice. If Your Honor would consider with prejudice—
>
> THE COURT: No, no, no. I'll give you one without prejudice if you want.
>
> [CHAPMAN'S COUNSEL]: No, Your Honor.

App. 31-32a.

During this colloquy, Chapman himself affirmatively indicated that he wanted to accept the court's offer of a mistrial, which is why the district court said, "I'm sorry. You want a mistrial?" App. 32a. As Chapman later explained:

> Judge Quarles indicated to my defense counsel ... that he was prepared to grant the mistrial motion. He asked [counsel] if he wanted a mistrial. At this point the Judge's gavel was raised indicating that he was prepared to grant a mistrial. I immediately told my counsel, ... Yes!, indicating my instructions to accept the mistrial. My instructions were said loud enough to be heard by those in attendance at my trial.

App. 24a. That account is buttressed by a sworn declaration from a member of the defense team:

> When Judge Quarles stated that he was prepared to grant a mistrial and inquired of [defense counsel] if [counsel] wanted him to grant a mistrial, I heard Mr. Chapman say "yes" to his counsel .... I was seated in the first row of the gallery behind the defense

> table, approximately eighteen feet away. Mr. Chapman's vocalization of "yes" was loud enough for me to clearly hear him from my location.

App. 28a.

The district court, however, permitted defense counsel to overrule his client, and the trial proceeded. Chapman was subsequently convicted and sentenced to more than five years in prison. The Fourth Circuit affirmed the conviction on direct appeal, *see United States v. Chapman*, No. 04-5010, 209 F. App'x 253 (4th Cir. Dec. 8, 2006) (unpublished), and this Court thereafter denied a petition for a writ of certiorari, *see Chapman v. United States*, 550 U.S. 949 (2007).

B. Proceedings Below

In 2008, Chapman filed a *pro se* federal habeas petition in the U.S. District Court for the District of Maryland, alleging, *inter alia*, that he received ineffective assistance when his defense counsel rejected the district court's offer of a mistrial over his express instructions to the contrary. *See* App. 24-27a. In support of the petition, Chapman attached the affidavit of a member of the defense team supporting his rendition of events. *See* App. 28-29a.

The district court (Quarles, J.) denied the petition without holding an evidentiary hearing. App. 18-23a. According to the district court, Chapman's ineffective-assistance claim failed as a matter of law because "Chapman's counsel was within his discretion as attorney to move forward with the case, *even though it was against Chapman's wishes*." App. 22a (emphasis added).

The Fourth Circuit granted Chapman's *pro se* motion for a Certificate of Appealability on this issue, *see* App. 17a, and appointed the undersigned counsel to represent Chapman. The Fourth Circuit, however, affirmed the district court's dismissal of the petition. App. 1-15a. The majority broadly held that criminal defense counsel has the unfettered "right" to make tactical decisions at trial over the defendant's objections. App. 3-11a. Judge Michael concurred in the judgment, concluding that it was reasonable on the facts of this case (even though, as the majority pointed out, *see* App. 4-5a n.*, those facts were disputed and the district court never held an evidentiary hearing) for Chapman's counsel to override his client's instructions. App. 12-15a. The Fourth Circuit denied a subsequent rehearing petition, *see* App. 16a, and this petition follows.

REASON FOR GRANTING THE WRIT

Criminal Defense Counsel Does Not Provide The "Assistance" Guaranteed By The Sixth Amendment By Making A Tactical Decision Regarding The Conduct Of A Trial Over The Defendant's Objection.

The Fourth Circuit held below, echoing the Eleventh Circuit, that a criminal defense attorney has the "*right* to make tactical decisions about the conduct of a criminal trial [even] if the client expresses disagreement with the attorney's decision." App. 11a (emphasis added); *see also id.* at 4a (endorsing the proposition that "the decision belongs to the attorney," and the defendant's disagreement with that decision is "simply irrelevant"); *Burke*, 257 F.3d at 1324 ("[T]he decision to refrain from asking the court for a mistrial is a tactical decision

entrusted to defense counsel, binding the defendant *even when the defendant has expressed a contrary wish to his lawyer*.") (emphasis added). It is hard to imagine a more clearly incorrect statement of the law. The only "right" at issue here is a criminal defendant's Sixth Amendment right "to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

And that right, this Court has explained, cannot be infringed on the ground that an attorney knows better than a criminal defendant what is in the defendant's best interests. *See Faretta*, 422 U.S. at 832-35. To the contrary, the Sixth Amendment "grants to the accused *personally* the right to make his defense." *Id.* at 819 (emphasis added). The possibility that a defendant may exercise that right unwisely provides no basis to negate its existence—just as the First Amendment guarantees the right to free speech even though people may live to regret what they say.

The Sixth Amendment right to the "Assistance" of counsel, as *Faretta* explains, leaves the defendant in control of his defense. "[A]n assistant, however expert, is still an assistant." *Id.* at 820. If counsel were free to override a defendant's decisions, then counsel would be "not an assistant, but a master; and the right to make a defense [would be] stripped of the personal character upon which the Amendment insists." *Id.* (footnote omitted). Thus, counsel's authority to make decisions binding on the defendant "can only be justified ... by the defendant's consent." *Id.* "Unless the accused has acquiesced in such representation, the defense presented is not the defense guaranteed him by the Constitution, for, in a

very real sense, it is not his defense." *Id.* at 821. A criminal defendant thus has the "power, if present [at his trial], to give advice or suggestion *or even to supersede his lawyers altogether* ...." *Id.* at 816 (emphasis added). Indeed, the law could scarcely be otherwise, given that it is the defendant, not his counsel, "who suffers the consequences if the defense fails." *Id.* at 819-20; *see also id.* at 834 ("The defendant, and not his lawyer or the State, will bear the personal consequences of a conviction.").

The Fourth Circuit did not address (or even cite) *Faretta*, but started its analysis from the premise that "[i]t is by now well-established that in a criminal trial, defense counsel has the authority to manage most aspects of the defense without first obtaining the consent of the defendant." App. 5a (citing *Florida v. Nixon*, 543 U.S. 175, 187 (2004)). Only a very few decisions are so "fundamental" that they require counsel affirmatively to obtain the defendant's consent. App. 5-6a. The Fourth Circuit contrasted such "fundamental" decisions with run-of-the-mill "tactical" decisions that do *not* require a defendant's consent. *See id.* Because "decisions involving mistrials—whether to seek a mistrial or accept a mistrial offered by the trial court—are tactical decisions left to the sound judgment of counsel," the court declared, they do not require the defendant's consent. App. 11a; *see also id.* at 5-8a.

These points are both uncontroversial and irrelevant. The problem here is not that defense counsel rejected the district court's offer of a mistrial without securing Chapman's *consent*, but that defense counsel rejected the district court's offer of a mistrial over Chapman's *objection*. Those are two

totally different issues. As the Fourth Circuit acknowledged, Chapman does not argue "that counsel should have consulted with him before rejecting the mistrial offer." App. 4a. "Instead, Chapman contends only that counsel's performance was deficient because counsel ignored Chapman's instructions to accept the mistrial offered by the trial court." *Id.*; *see also* App. 7a ("[Chapman] does not argue that decisions regarding mistrials are so fundamental that they must be made by the client rather than the attorney.").

The Fourth Circuit fused the two issues together by holding that "[a] criminal defense attorney is obligated to follow his client's wishes *only* with regard to the fundamental issues that must be personally decided by the client." App. 7a (emphasis added). In other words, if counsel is entitled to make a decision without the defendant's consent, then counsel is entitled to ignore the defendant's instructions. "[I]f consultation and consent by the client are not required with regard to these tactical decisions, the client's expressed disagreement with counsel's decision cannot somehow convert the matter into one that must be decided by the client." App. 8a.

The Fourth Circuit thereby turned the law on its head. As this Court has long recognized, the client is the principal and the attorney is his agent. *See, e.g.*, *Gonzalez*, 553 U.S. at 248-49; *New York v. Hill*, 528 U.S. 110, 115 (2000); *Faretta*, 422 U.S. at 820-21 & n.16. Under basic principles of agency law, an agent has the authority to bind the principal within the scope of the agency. *See, e.g.*, *Restatement (Third) of the Law of Agency* § 1.01 cmt. c (2006). This Court's

precedents carving out a small number of fundamental decisions as to which the defendant personally must consent represent a narrow exception to this general agency principle. But that exception, which seeks to safeguard the defendant's rights, in no way limits the defendant's authority over his counsel. The defendant always remains free to revoke or limit the agency; counsel's authority to make decisions binding on the defendant ultimately flows from the defendant's consent. *See Faretta*, 422 U.S. at 820; *see also Restatement (Third) of Agency* § 8.09(2) ("An agent has a duty to comply with all lawful instructions received from the principal and persons designated by the principal concerning the agent's actions on behalf of the principal."); *Restatement (Third) of the Law Governing Lawyers* § 21 cmt. b (2000) ("[T]he client may limit the lawyer's authority by contract or instructions."); *id.* § 21 cmt. d ("A lawyer may not continue a representation while refusing to follow a client's continuing instruction."). That explains why counsel cannot ignore a defendant's instructions, because "action taken by counsel over his client's objection ... would have the effect of revoking the agency with respect to the action in question." *Gonzalez*, 553 U.S. at 254 (Scalia, J., concurring in the judgment).

That is why, in cases holding that a defendant need not consent to particular decisions by counsel, both this Court and other federal courts always have emphasized that the situation would be different if the defendant affirmatively objected. Thus, in *Gonzalez* this Court noted that "we do not have before us an instance where a defendant instructs the lawyer or advises the court in an explicit, timely way" of an objection to counsel's decision. 553 U.S.

at 246. Similarly, the Sixth Circuit has held, in the context of a mistrial motion, that "'petitioner is bound by his counsel's choice *in the absence of express objection*.'" *Watkins v. Kassulke*, 90 F.3d 138, 142-43 (6th Cir. 1996) (emphasis added; quoting *Armstrong v. United States*, 367 F.2d 821, 821 (7th Cir. 1966)); *see also Hawkins v. Hannigan*, 185 F.3d 1146, 1155 (10th Cir. 1999) ("'[C]ounsel in a criminal case may waive his client's Sixth Amendment right of confrontation by stipulating to the admission of evidence, *so long as the defendant does not dissent from his attorney's decision*.'") (emphasis added; quoting *United States v. Stephens*, 609 F.2d 230, 232-33 (5th Cir. 1980)).

It does not follow, in short, that because counsel need not secure a defendant's consent to certain tactical decisions, "the law places [those] decisions *solely* in the hands of the criminal defense attorney." App. 10a (emphasis added); *see also* App. 7a ("If the decision is a tactical one left to the sound judgment of counsel, the decision must be just that—left to the judgment of counsel."). Tactical decisions regarding the conduct of a criminal trial are in counsel's hands only to the extent that the defendant remains content to leave them there. Contrary to the Fourth Circuit's assertion, criminal cases do not entail any "reallocation of rights and duties" between attorney and client, App. 10a, and an attorney has no "right to make tactical decisions about the conduct of a criminal trial if the client expresses disagreement with the attorney's decision," App. 11a.

Unfortunately, the Fourth Circuit's decision in this case cannot be dismissed as an aberration. To the contrary, the Fourth Circuit relied on an earlier

Eleventh Circuit decision that also concluded that counsel was entitled to ignore the defendant's express instructions with respect to a tactical decision in a criminal trial. *See Burke*, 257 F.3d at 1324. That case, like the decision below, is written as if *Faretta* did not exist. *Burke* starts from the premise that a defendant has *no* say over the conduct of his criminal trial other than the limited decisions as to which counsel must seek his consent. Giving the defendant the final say over any other decisions, the Eleventh Circuit declared, would "erode defense counsel's authority at trial." *Id.* at 1323; *see also id.* ("Defense counsel in a criminal trial is more than an adviser to a client with the client's having the final say at each point."). Indeed, *Burke* warned that "[w]hen the defendant is given the last word about how his case will be tried, the defendant becomes his own trial lawyer," *id.*, as if the Sixth Amendment and *Faretta* did not guarantee precisely that. The Fourth Circuit below approvingly block-quoted this portion of *Burke*. *See* App. 10-11a.

In sharp contrast to this case and *Burke*, both the North Carolina and Tennessee Supreme Courts have held that, under the Sixth Amendment, a criminal defendant has the final word on tactical decisions at his trial. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59. In each of those cases, as here, a defendant and his counsel disagreed about a tactical decision in a criminal trial. In each of those cases, however, the trial court followed *Faretta* and gave the defendant the final say. After the defendants in those cases were convicted and sentenced, they appealed on the ground that it was error for the trial courts to have allowed them to overrule their counsel. Both state

supreme courts rejected that argument, holding that the defendants had a federal Sixth Amendment right to overrule their trial counsel, and could not thereafter complain if they came to regret the exercise of that right. *See Brown*, 451 S.E.2d at 186-87; *Ali*, 407 S.E.2d at 188-90; *Zagorski*, 983 S.W.2d at 657-59.

These decisions cannot be reconciled with the decision below and *Burke*. As the North Carolina Supreme Court has explained, "when counsel and a fully informed criminal defendant client reach an absolute impasse as to such tactical decisions, the client's wishes must control; this rule is in accord with the principal-agent nature of the attorney-client relationship." *Ali*, 407 S.E.2d at 189; *see also id.* ("The attorney is bound to comply with her client's lawful instructions, and her actions are restricted to the scope of the authority conferred.") (internal quotation omitted). After all, "[t]he attorney-client relationship rests on principles of agency, and not guardian and ward," and "[n]o person can be compelled to take the advice of his attorney." *Id.* (internal quotation omitted); *see also Zagorski*, 983 S.W.2d at 658 ("Ultimately, ... the right to a defense belongs to the defendant."); *id.* at 659 ("When a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision.").

The decision below thus creates the anomalous situation that a criminal defendant on trial in North Carolina has greater federal constitutional rights in state than in federal court. A defendant's Sixth Amendment right to make a tactical decision in his criminal trial should not turn on whether he finds

himself in state or federal court. Needless to say, only this Court can bring uniformity on this important question of federal constitutional law.

CONCLUSION

For the foregoing reasons, the Court should grant this petition for writ of certiorari.

Respectfully submitted,

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